

5/24/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nissan Jidosha Kabushiki Kaisha, T/A Nissan Motor Co.,
Ltd.

Serial Nos.: 75/531,326 SUT
75/531,325 NISSAN SUT
75/531,337 FRONTIER SUT

Manuel A. Abascal of Latham & Watkins for Nissan Jidosha
Kabushiki Kaisha, T/A Nissan Motor Co., Ltd.

Khanh Le, Trademark Examining Attorney, Law Office 104
(Sidney I. Moskowitz, Managing Attorney).

Before Hanak, Walters and Drost, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

On August 5, 1998 Nissan Jidosha Kabushiki Kaisha, T/A
Nissan Motor Co., Ltd. (Nissan or applicant) filed three
applications seeking to register the following three marks
for "motor vehicles, namely vehicles which combine a sport
utility vehicle-like passenger compartment with a cargo bed,
and structural parts therefor": SUT; NISSAN SUT; and
FRONTIER SUT. In each case, Nissan claimed that it had a
bona fide intention to use mark in commerce.

With regard to the application to register SUT, the

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examining attorney has refused registration pursuant to Section 2(e)(1) of the Trademark Act on the basis that said mark is merely descriptive of applicant's goods. With regard to the applications to register NISSAN SUT and FRONTIER SUT, the examining attorney, citing Section 6 of the Trademark Act, has refused registration because applicant has not disclaimed the SUT portion of the mark, which the examining attorney contends is merely descriptive of applicant's goods.

When the refusals to register were made final, applicant appealed to this Board. Applicant and the examining attorney have filed briefs. Applicant did not request a hearing.

While the records in these three cases are not identical, they are substantially the same. Moreover, the legal issue in each of the three cases is the same, namely, whether the initialism SUT is merely descriptive of "motor vehicles, namely, vehicles which combine a sport utility vehicle-like passenger compartment with a cargo bed, and structural parts therefor." Accordingly, we will decide all three cases in one opinion.

The issue in this case is not whether the phrase "sport

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utility truck" is merely descriptive of applicant's goods. Rather, the issue is whether the initialism SUT is merely descriptive of applicant's goods. The test for determining whether a series of initials is merely descriptive was established by the predecessor to our primary reviewing Court in Modern Optics, Inc. v. Univis Lens Co., 234 F.2d 504, 110 USPQ 293 (CCPA 1956). This test is as follows:

It does not follow, however, that all initials of combinations of descriptive words are ipso facto unregistrable. While each case must be decided on the basis of the particular facts involved, it would seem that, as a general rule, initials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith. 110 USPQ at 295 (emphasis added).

The Modern Optics rule for determining whether initials are merely descriptive has been favorably received by other Courts of Appeal. See Anheuser-Busch, Inc. v. Stroh Brewery Co., 750 F.2d 631, 224 USPQ 657, 659 (8 Cir. 1984) ("We find the reasoning of Modern Optics persuasive."); G. Heileman Brewing Co. v. Anheuser-Busch Inc., 873 F.2d 985, 10 USPQ2d 1801, 1808 (7 Cir. 1989). Of course, this Board would be bound to follow the rule of Modern Optics regardless of its favorable reception by other Circuits.

As previously noted, there are some slight variances in

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the evidentiary records in these three cases. However, the same attorneys representing Nissan and the PTO have handled all three cases, and accordingly, we will consider all of the evidence in each of these three cases in determining whether the initials SUT are merely descriptive of "motor vehicles, namely, vehicles which combine a sport utility vehicle-like passenger compartment with a cargo bed and structural parts therefor."

At the outset, we note that Nissan has made of record literally hundreds of full text articles taken from magazines and newspapers which discuss, at least in part, motor vehicles combining a sport utility passenger compartment with a cargo bed. Nissan argues that its evidence demonstrates that the phrase "sport utility truck" is at most suggestive, and not descriptive, of the aforementioned vehicles. In this regard, Nissan has made of record approximately 175 full text articles from various magazines and newspapers which discuss sport utility vehicles with cargo beds, but which make no mention of the term "sport utility truck" or the initials SUT. In the August 29, 1999 edition of the Chicago Tribune there appears the following sentences: "Sport Trac ... is a four-door

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[Ford] Explorer sport-utility vehicle with a four-foot long pickup truck cargo bed behind the passenger cabin. Ford's Lincoln luxury division will go Sport Trac one better when it brings out the Lincoln Blackwood early in the 2001 calendar year, a four-door full-size Navigator with a pickup bed behind the passenger cabin." In the foregoing article, there is no reference to the term "sport utility truck" or the initials SUT. However, this article is clearly discussing the type of vehicle described in Nissan's three applications, namely, vehicles which combine a sport utility vehicle-like passenger compartment with a cargo bed.

Another article submitted by Nissan is from the August 9, 1999 edition of The Wall Street Journal, and it contains the following sentence: "General Motors Corporation will offer an all-plastic pick up-truck cargo bed and tailgate as an option next autumn on the 2001 model extended-cab Chevrolet Silverado." Nissan has submitted these approximately 175 full text articles in an effort to demonstrate that writers for such major publications as the Chicago Tribune and The Wall Street Journal do not use the term "sport utility truck" to describe vehicles which clearly fall within Nissan's description of goods. Nissan contends that the

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absence of the term "sport utility truck" in these 175 articles demonstrates that "the words 'sport utility truck' are suggestive, not descriptive because it requires thought to understand that they represent a combination of a sport utility vehicle and a truck." (Nissan's brief page 15).

Nissan also made of record 206 full text articles involving motor vehicles wherein the term "sport utility truck" or the initials SUT or both appeared. Of these 206 articles, only 38 (18%) used the initials SUT. Of these 38 articles, all but 4 (1.9% of 206; 10.5% of 38) used the initials SUT solely in a trademark manner to refer to Nissan's brand of vehicles.

The examining attorney has not disputed Nissan's evidence. Indeed, throughout his brief the examining attorney has made reference to it. Moreover, the examining attorney has even conceded that "the majority of the articles do not use the letters SUT in a descriptive manner." (Examining attorney's brief page 5). Rather, the examining attorney had simply found three additional articles which use the initials SUT in connection with vehicles not made by Nissan.

In its reply brief, Nissan argues that the examining

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attorney's evidence in no way establishes that the initials SUT are "generally understood as representing descriptive words." Modern Optics, 110 USPQ2d at 295. In this regard, Nissan makes two points. First, Nissan points out that in the total of 7 articles wherein the initials SUT are used to refer to vehicles other than those manufactured by Nissan, the writers included an explanation that these initials stood for "sport utility truck." Nissan argues that if the initials SUT were so generally understood as representing descriptive words, then the authors would not have had the need to explain what these initials meant. Second, Nissan points to the following sentences relied upon by the examining attorney taken from the December 30, 1999 issue of The Chicago Daily Herald:

Acronym spinoffs from SUV crossover vehicles inflict acronymophobia (the pretentious word defining fear of excessive use of acronyms), not to be confused with acrophobia, the fear of heights (OK to roll your eyes and yawn here.) Prime examples are SAV (sport-activity vehicle), SUT (sport-utility truck), HUV (high-utility vehicle), LUV (luxury-utility vehicle), MAV (multiactivity vehicle), and SSU (your guess is as good as mine).

If that isn't baffling enough, Honda has reportedly developed an Accord engine that meets CARB (California Air Resources Board) and, I kid you not, SULEV (super ultra-low emissions vehicle) standards. Being environmentally friendly, I wonder if it comes equipped with a SDPS (super-duper-pooper-scooper)?

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Nissan makes the point that one of the very articles relied upon by the examining attorney refers to these various initials, including SUT, as "baffling." Obviously, if certain initials are "baffling," it can hardly be said that they are generally understood as representing descriptive words.

One final matter merits discussion. The examining attorney attached for the first time to his brief what he describes as an except from "an on-line acronym dictionary." The examining attorney requests that this Board take judicial notice of this "dictionary." (Examining attorney's brief page 4). This "dictionary" lists 9 definitions for the initials SUT, the fifth definition being "Sport Utility Truck."

In its reply brief, Nissan strenuously objects to our taking judicial notice of this "dictionary." Nissan "visited" this on-line Acronym Finder and attached as Appendix A to its reply brief the preface to this on-line resource. The preface makes it clear that anyone can submit an acronym to be included in this "dictionary." In addition, the unidentified "authors" of this on-line Acronym Finder state that they take no responsibility for the

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accuracy of the information contained therein, and indeed, they specifically include the following warning: "Use information from this site at your own risk."

In view of the foregoing, we find that this on-line Acronym Finder is not the type of material which is reliable enough for us to take judicial notice. According, we have accorded no weight to this Acronym Finder. Moreover, we note that Nissan attached to its reply brief photocopies of very recent mainline, printed dictionaries, none of which define the initials SUT as meaning sport utility truck. These reference works include Acronyms, Initialisms & Abbreviations Dictionary (28th ed. 2000); The Oxford Dictionary of Abbreviations (2d ed. 1998); Abbreviations Dictionary (1999); Merriam-Webster's Collegiate Dictionary (1998); The Oxford American Dictionary of Current English (1999); The Oxford Dictionary of New Words (1997); Random House Webster's College Dictionary (1999) and five other recent dictionaries.

In sum, we cannot say that based upon this particular evidentiary record, the examining attorney has established that the initials SUT are "generally understood as representing descriptive words."

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Decision: The refusals to register are reversed.

